IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge R. Brooke Jackson

Civil Action No. 18-cv-03016-RBJ-NYW

DAVID BARTCH,

Plaintiff,

v.

MACKIE A. BARCH and
TRELLIS HOLDINGS MARYLAND, INC.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF JUDGMENT

This case was tried to the Court from July 11 to July 14, 2022. Plaintiff David Joshua Bartch, who goes by "Josh," sued defendants Mackie Barch and Trellis Holdings Maryland for allegedly refusing to return plaintiff's interest in a medical marijuana company, Doctor's Orders Maryland (DOMD)[1]. Due to the similarity in the plaintiff's and defendant Barch's names, I will refer to them as "plaintiff" and "Mackie" or "defendant" in this order.

I. BACKGROUND

This section summarizes the parties' dispute and lays out uncontroversial facts. I resolve the disputed factual questions in later sections. In describing the background and making my findings of fact, the Court has considered the reporter's unofficial transcript, the exhibits admitted into evidence, and the Court's own notes, recollections, and impressions of the evidence.

[1] Doctor's Orders Maryland is currently doing business as Culta, LLC. When I refer to DOMD, I mean the company currently called Culta.

Plaintiff took over a small marijuana business in Colorado, Doctor's Orders Denver, and grew it into a successful company. He connected with Mackie, who had a more traditional business background, and the two of them collaborated on plaintiff's Denver business. They also contemplated a new venture in Maryland, which had recently legalized medical marijuana. Plaintiff signed a deal with the preeminent marijuana law firm, Vicente Sederberg LLP, to represent him in Maryland. With the help of Vicente Sederberg and defendant, plaintiff founded Doctor's Orders Maryland (DOMD) on June 6, 2015. He owned 70% of the company as Class A dilutable shares through a subsidiary, DO Maryland OP LLC (DOMD OP). A prominent philanthropic family, the Weinbergs, owned the other 30% as Class B non-dilutable shares.

DOMD's sole focus was getting a license from the Maryland Medical Cannabis Commission. The commission was soliciting applications for a small number of growing licenses, processing licenses, and distribution licenses. Plaintiff's cannabis experience and the Doctor's Orders brand were an important part of DOMD's optimism about receiving a license. Over the next few months, plaintiff, defendant, the Weinbergs, and Vicente Sederberg worked together to position DOMD for the competitive application process. Plaintiff contributed at least $251,000 to the business. Defendant worked hard, and all expected that he would be rewarded with a substantial equity interest. Vicente Sederberg received a 4.5% ownership interest in DOMD in October 2015, reducing plaintiff's ownership to 65.5%.

Although plaintiff's inclusion in DOMD was important for the company's prospects, it was legally suspect. Plaintiff had, in 2014, entered into a deferred judgment in Denver District Court for misdemeanor drug possession. In June 2015 that court clarified that plaintiff would violate the conditions of his deferred judgment if he owned a marijuana business, but the court would allow him reasonable time to divest if he chose to do so. Less than a month later, plaintiff

formed DOMD.[2] The parties apparently thought this was okay because DOMD was *technically* not a marijuana business, just a corporate entity exploring the possibility of applying for licenses to become a marijuana company.

DOMD submitted its applications on November 6, 2015. In preparation, the DOMD team connived and obfuscated whenever they felt it would help their application chances.[3] In one September email, Brian Vicente of the Vicente Sederberg law firm encouraged the team to find people they could put down as "CFO, CEO, Security Head, etc." for application purposes, but assured the team that "[o]f course, that does not mean we [DOMD] have to hire them once the license is awarded." Ex. 53. A number of email threads show that DOMD planned to conceal the company's true ownership for one reason or another. Vicente Sederberg advised them that "Maryland residents look better on paper than non-residents." Ex. 23. Defendant, who at this point had worked hard enough to merit an ownership interest, was kept off the application because of possible tax and/or legal issues. And, plaintiff, whose deferred drug-possession conviction would have torpedoed the application, was nowhere to be found on the final document DOMD submitted.

A new operating agreement, enacted the day before DOMD's application, shows a new ownership structure. The Weinbergs held 30%, Vicente Sederberg had 4.5%, a new investor named Herb Wilkins had, in exchange for $1 million, acquired a 5% interest, and DOMD OP held 60.5%. But in this new agreement, DOMD OP was no longer owned by plaintiff but by Jeff

[2] Over the next two years, plaintiff and defendant also formed similar companies in Oregon and Hawaii — which they split 50/50 — for similar purposes.

[3] DOMD and their lawyers sought to cover their tracks with emails saying things like "we need to avoid creating 'side deals,'" or "the goal . . . is 100% transparency with the commission." Ex. 20. These legalistic fig leaves were meant to conceal the dishonesty with which DOMD approached the application process. The Court, which had the opportunity to peer behind the curtain, was not fooled. The Maryland Medical Cannabis Commission, which was not shown how the sausage was made, apparently was.

Black and Ashley Peebles. Plaintiff had transferred his entire interest to Black and Peebles. The parties dispute whether Black and Peebles had agreed to return the interest to plaintiff (less a small fee) or whether plaintiff's transfer was a permanent divestiture.

DOMD was pre-approved for two licenses on August 16, 2016. This meant that it had won the application process and, if it successfully built out the business and passed additional regulatory checks in the coming months, would be awarded final licenses. DOMD's ownership changed again in the interim. It took on some new investors, which diluted DOMD OP's ownership interest. Black and Peebles gave most of their interest to defendant through a holding company, Trellis Holdings Maryland, that defendant had created. Plaintiff took the position that half of the interest transferred to Trellis was rightfully his. Defendant did not transfer plaintiff any interest in DOMD. After plaintiff sued for an interest in DOMD, defendant transferred nearly his entire ownership interest to a trust.

Plaintiff sued on November 23, 2018, asserting seven claims: (1) for a declaratory judgment that Trellis legally holds and is obligated to transfer 50% of its Class A member interest in DOMD to plaintiff; (2) civil theft; (3) conversion; (4) constructive trust; (5) breach of contract (specific performance); (6) breach of contract (damages); and (7) unjust enrichment. ECF No. 1. Plaintiff ultimately withdrew claims one and five, and the Court granted defendant's motion for judgment on the pleadings as to claim four. *See* ECF No. 149 at 3, 7. Claims two, three, six, and seven were tried to the Court.

II. BREACH OF CONTRACT

A party attempting to recover on a claim for breach of contract must prove: (1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages

to the plaintiff. *Harper v. Mancos Sch. Dist.*, 837 F. Supp. 2d 1211, 1217–18 (D. Colo. 2011) (citing *Western Distributing Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo.1992)). The parties dispute (1) the existence of a contract and (4) damages.

A. Plaintiff and Defendant Had an Enforceable Contract

The parties disagree about whether the oral contract plaintiff seeks to enforce existed. A contract's existence is a question for the factfinder, particularly when "the evidence is conflicting or admits of more than one inference." *I.M.A., Inc. v. Rocky Mountain Airways, Inc.*, 713 P.2d 882, 887 (Colo. 1986). A contract only exists when the parties have a meeting of the minds as to all essential terms of the contract. *See Jorgensen v. Colorado Rural Properties, LLC*, 226 P.3d 1255, 1260 (Colo. App. 2010). The parties need not discuss every material term for there to be a meeting of the minds if a party can show that both parties knew and agreed to the term. *Harper v. Mancos School Dist. RE-6*, 837 F. Supp. 2d 1211, 1218 (D. Colo. 2011).

To start, plaintiff did not allege, as defendant claims, the existence of a single contract governing all of plaintiff's transactions involving DOMD ownership interests. Such a contract would have required that plaintiff temporarily transfer his interest to Black and Peebles, entitled Black and Peebles to retain a portion of that equity, and required that they split the remaining shares between plaintiff and defendant. Defendant, assuming that this is the contract alleged by plaintiff, argues that the contract is unenforceable because it was made for an improper purpose. But plaintiff did not allege this contract. If he had, then Black and Peebles would have breached the contract by transferring their entire interest to defendant instead of splitting it between plaintiff and defendant. Plaintiff would have sued Black and Peebles in that case, not Mackie.

Nor did plaintiff allege breach of a nationwide partnership agreement whereby plaintiff and defendant agreed to split their equity interests in all marijuana businesses across the country. Plaintiff advanced this theory in closing arguments. He claimed that the contract's existence is

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